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4 **UNITED STATES DISTRICT COURT**
5 **DISTRICT OF NEVADA**
6

7 U.S. BANK, NATIONAL ASSOCIATION,

8 Plaintiff,

9 vs.

10 NV EAGLES, LLC et al.,

11 Defendants.
12

2:15-cv-00786-RCJ-PAL

ORDER

13 This case arises from the foreclosure of a residential property pursuant to a homeowners
14 association lien. Pending before the Court are three offensive Motions for Summary Judgment
15 (ECF Nos. 130, 131, 147), one defensive Motion for Summary Judgment (ECF No. 134), and a
16 Motion to File Excess Pages (ECF No. 132).

17 **I. FACTS AND PROCEDURAL BACKGROUND**

18 On June 27, 2006, Michael Cress purchased a home located at 517 W. Mesquite
19 Boulevard #1524, Mesquite, Nevada 89027 (“the Property”). (Am. Compl. ¶¶ 8, 12, ECF No.
20 55.) The Deed of Trust (“DOT”) executed identified GreenPoint Mortgage Funding, Inc. as the
21 lender, MERS as the beneficiary, Marin Conveyance Corp. as the trustee, and a secured amount
22 of \$148,000. (*Id.* at ¶ 13.) The Property is in a planned community and is subject to certain
23 covenants, conditions, and restrictions (“CC&Rs”). On May 31, 2012, Defendant Nevada
24 Association Services, Inc. (“NAS”)—as agent of Sandstone Condominiums Homeowners

1 Association (“HOA”)—recorded a Notice of Default and Election to Sell against the Property,
2 due to Cress’s failure to pay HOA dues. (*Id.* at ¶ 18.)

3 In July 2012, Bank of America, the prior beneficiary and servicer of the loan and Plaintiff
4 U.S. Bank’s predecessor-in-interest, requested a current HOA lien payoff demand and account
5 ledger from NAS. (*Id.* at ¶ 19.) Bank of America was then informed by NAS that NAS was not
6 willing to provide a current payoff ledger due to a concern of violating the Fair Debt Collection
7 Practices Act. (*Id.* at ¶ 20.) In the midst of these payoff ledger discussions, on July 30, 2012,
8 U.S. Bank obtained all beneficial interest in the Property via recorded assignment. (*Id.* at ¶ 14.)
9 Despite the assignment to U.S. Bank, however, Bank of America continued to seek, through its
10 agent Miles Bauer Bergstrom & Winters LLP (“Miles Bauer”), to satisfy the superpriority
11 portion of the HOA’s lien. Based on information about the assessments charged on similar
12 properties within the HOA, Bank of America estimated the HOA’s lien plus reasonable
13 collection costs to be about \$2,036.33. (*Id.* at ¶ 21.) On August 9, 2012, Miles Bauer tendered
14 this amount to NAS in an attempt to protect what was now U.S. Bank’s interest in the Property.
15 (*Id.* at ¶ 22.) On August 10, 2012, NAS informed Miles Bauer that its tender was rejected. (*Id.* at
16 ¶ 23.)

17 On January 22, 2013, NAS recorded a Notice of Foreclosure Sale against the Property at
18 the HOA’s direction. (*Id.* at ¶ 24.) On May 21, 2013, a Foreclosure Deed was recorded with
19 Defendant Underwood Partners, LLC (“Underwood”) named as the grantee. Despite an
20 appraised value of \$79,500, Underwood paid just \$9,000 for the Property at the foreclosure sale.
21 (Appraisal Report, ECF No. 146-13; Am. Compl. ¶¶ 25–26.) Underwood also took the
22 foreclosure deed without warranty. (Foreclosure Deed, ECF No. 130-1 at 46.) Subsequently, on
23 October 18, 2013, Underwood Partners sold the Property to Defendant NV Eagles, LLC. (Am.
24 Compl. ¶ 27; Sale Deed, ECF 148-8.) Underwood and NV Eagles are “parent and direct

1 subsidiary,” both with the same business address in Newport Beach, California. (Declaration of
2 Value, ECF No. 148-8 at 5.) Moreover, although it is Underwood that appears as the grantee on
3 the Foreclosure Deed, NV Eagles states, in its own opposition brief: “[NV] Eagles is an innocent
4 third-party purchaser, having paid \$9,000 at the trustee’s sale.” (Resp. 18, ECF No. 150.)

5 Plaintiff alleges ten causes of action in its First Amended Complaint (“FAC”): (1)
6 voidable transfer under N.R.S. § 112.190; (2) voidable transfer under N.R.S. § 112.180 against
7 Underwood and NV Eagles; (3) declaratory relief; (4) quiet title; (5) wrongful foreclosure
8 against the HOA and NAS; (6) negligence against the HOA and NAS; (7) breach of contract
9 against the HOA and NAS; (8) unjust enrichment against Underwood, NV Eagles, the HOA, and
10 NAS; (9) breach of the covenant of good faith and fair dealing against the HOA and NAS; (10)
11 declaratory relief that N.R.S. § 116.3116 *et seq.* violates the Fifth Amendment to the Nevada and
12 U.S. Constitutions.

13 U.S. Bank has moved for offensive summary judgment in multiple motions, (ECF Nos.
14 130, 131, 147), and NV Eagles has moved for defensive summary judgment on all claims in the
15 FAC, (ECF No. 134).

16 **II. LEGAL STANDARDS**

17 A court must grant summary judgment when “the movant shows that there is no genuine
18 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
19 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson v.*
20 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there
21 is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* A
22 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
23 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

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1 In determining summary judgment, a court uses a burden-shifting scheme. The moving
2 party must first satisfy its initial burden. “When the party moving for summary judgment would
3 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
4 directed verdict if the evidence went uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v.*
5 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks
6 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
7 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
8 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
9 party failed to make a showing sufficient to establish an element essential to that party’s case on
10 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

11 If the moving party fails to meet its initial burden, summary judgment must be denied and
12 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
13 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the
14 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*
15 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
16 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
17 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
18 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809
19 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary
20 judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor v. List*,
21 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
22 allegations of the pleadings and set forth specific facts by producing competent evidence that
23 shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S. at 324.

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1 At the summary judgment stage, a court’s function is not to weigh the evidence and
2 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
3 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
4 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
5 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.
6 Notably, facts are only viewed in the light most favorable to the non-moving party where there is
7 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even
8 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly
9 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not
10 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

11 **III. ANALYSIS**

12 **A. Tender of the Superpriority Piece of the HOA’s Lien**

13 This Court has held that the unconditional pre-foreclosure tender of the superpriority lien
14 amount has the legal effect of extinguishing the superpriority portion of an HOA lien, whether
15 the tender is accepted or not. *See, e.g., U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, No.
16 3:15-cv-00241, 2016 WL 4473427, at *6–8 (D. Nev. Aug. 24, 2016) (Jones, J.). Here, there is no
17 genuine dispute that the full superpriority piece was tendered prior to the sale. U.S. Bank has
18 adduced evidence that on or about August 9, 2012, after the HOA’s agent NAS refused to
19 provide a payoff amount for the superpriority portion of the HOA’s lien, its predecessor-in-
20 interest’s agent Miles Bauer tendered a check to NAS for \$2,036.33, comprising nine months’
21 worth of common assessments (a total of \$1,440) plus estimated reasonable collection costs. (*See*
22 *Jurani Aff.* ¶¶ 5–9, ECF No. 130–1 at 50; Resident Delinquency Detail, ECF No. 130–1 at 62
23 (indicating monthly assessments of \$160.00); Payoff Letter, ECF 130-1 at 37; Check, ECF No.
24 13-1 at 39; NAS’s Rejection of Delivery of Check, August 10, 2012, ECF No. 130–1 at 41). The

1 superpriority piece of an HOA loan does not include collection costs. *Horizons at Seven Hills*
2 *Homeowners Ass’n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 2016 WL 1704199, at *6
3 (Nev. 2016). Therefore, the uncontroverted evidence indicates that Miles Bauer tendered well in
4 excess of the HOA’s superpriority lien.

5 In addition, the Court finds that U.S. Bank’s tender was unconditional and that NAS’s
6 rejection of the tender was wrongful. First, the check tendered was an unconditional order to pay
7 money; that is part of the very definition of a check under the law of commercial paper. *See*
8 N.R.S. § 104.3104. The language Miles Bauer included with its cashier’s check states that Miles
9 Bauer, and presumably its client U.S. Bank’s predecessor-in-interest, will understand
10 endorsement of the check to mean they have fulfilled their obligations. (Payoff Letter, ECF 130-
11 1 at 37–38.) This language simply delineated how the tenderer would interpret the actions of the
12 recipient. It did not require NAS to take any action or waive any rights. And it did not depend on
13 any uncertain event or contingency. Thus, a reasonable jury could not find the tender was
14 conditional. In reality, the check was an unconditional order to pay money, permitting NAS (on
15 behalf of the HOA) to immediately demand and receive money from the drafter in the amount
16 indicated on the check without any further action or consent by Miles Bauer.

17 Second, NV Eagles cites an unpublished disposition of the Nevada Supreme Court to
18 argue that a rejected tender of the superpriority piece of an association’s lien does not extinguish
19 the lien if the rejection is “grounded on an honest belief that the tender was insufficient.” *Bank of*
20 *Am., N.A. v. Rugged Oaks Investments, LLC*, 383 P.3d 749 (Nev. 2016) (citing 59 C.J.S.
21 *Mortgages* § 582 (2016). (Resp. 8, ECF No. 150.) However, a more complete quotation of 59
22 C.J.S. *Mortgages* § 582 provides some much-needed context:

23 It has been held that the mortgagee must unconditionally accept the amount due
24 when properly tendered, and that a good and sufficient tender on the day when
payment is due will relieve the property from the lien of the mortgage, *except*
where the refusal was not unreasonable or arbitrary, but grounded on an honest

1 *belief that the tender was insufficient.* If a mortgagee wrongfully refuses to accept
2 such a tender, additional interest may be forfeited.

3 (Emphasis added.) Thus, it is not enough that an association or its foreclosure agent “honestly
4 believed” the tender was insufficient to satisfy the association’s lien. It is also essential that the
5 rejection of the tender was not unreasonable, arbitrary, or wrongful in any respect.

6 In this case, any reasonable juror would be compelled to find that NAS’s rejection of U.S.
7 Bank’s tender was both unreasonable and arbitrary. After NAS refused to provide Miles Bauer
8 with HOA lien payoff ledgers, Miles Bauer undertook to estimate and tender an amount
9 sufficient to satisfy the superpriority portion of the HOA’s lien. (See Jurani Aff. ¶¶ 5–9, ECF No.
10 130–1 at 50–51.) Regarding NAS’s receipt of the check from Miles Bauer, NAS’s in-house
11 counsel Chris Yergensen gave the following deposition testimony:

12 Q: Okay. Now, the fact that this letter is not in NAS’s file, can you explain that to
13 me?

14 A: Typically this letter along with this check was delivered via runner. And this
15 legal strategy was a global legal strategy by Miles Bauer. The letters were the
16 same. The checks were for nine months only. Miles Bauer knew that they were
17 not going to be accepted because they were a conditional offer of the
18 superpriority; there was a dispute on the amount. So, typically, the runner would
19 present the letter to NAS’s receptionist. *The receptionist would confirm that it
20 was the typical form letter with the typical check and then simply just reject it. So
21 it never made it – this type of letter and the check usually never made it past our
22 front desk.*

23 ...

24 A: Typically, our receptionist would look online. But, typically, our receptionist
got to the point where she could – she or he could just look at the second page and
determine that they were making the claim that this [sic] nine months only and
then just reject it. *The issue at the time was whether or not it would – they were
going to include costs of collecting. And this check, the letter made it clear that
the [sic] were not. So it was – it was pretty simply to reject it a [sic] that point.*

(Resp. 12, ECF No. 150 (emphasis added).)

1 Therefore, the evidence shows that NAS implemented a policy of summarily rejecting
2 superpriority payoff tenders without seriously considering them. NAS delegated the duty of
3 rejecting the tenders to its receptionist, rather than have someone with appropriate training and
4 expertise determine whether each tender was legally sufficient. Indeed, Mr. Yergensen's
5 testimony indicates that the tender in this case was rejected without so much as a simple
6 comparison of the check's value to the actual amount NAS believed the HOA was owed. Most
7 significantly, NAS rejected the check on a factually inaccurate basis, which demonstrates the
8 completely arbitrary nature of the rejection. Mr. Yergensen testified that Miles Bauer's check
9 was refused, at least in part, because "the issue at the time was whether [Miles Bauer] was going
10 to include costs of collecting" in the payoff amount, and "the letter made it clear [they] were
11 not." This is wrong. The check was in the amount of \$2,036.33, comprising nine months' worth
12 of unpaid common assessments and an additional \$623.33 in estimated collection costs. And the
13 letter clearly stated that "reasonable collection costs" were included in Miles Bauer's calculation
14 of the superpriority payoff amount. (*See* Mot. Summ. J. 10, ECF No. 130; Jurani Aff. ¶¶ 5–9,
15 ECF No. 130–1 at 50; Resident Delinquency Detail, ECF No. 130–1 at 62 (indicating monthly
16 assessments of \$160.00); Payoff Letter, ECF 130-1 at 37; Check, ECF No. 13-1 at 39.)

17 Surely, this type of indiscriminate summary rejection, without the least regard for the
18 actual amount tendered, can only be deemed wholly arbitrary and unreasonable. Furthermore,
19 Mr. Yergensen's testimony belies NV Eagles's contention that NAS rejected Miles Bauer's
20 tender because it "honestly believed" the HOA was owed more. By the admission of NAS's own
21 in-house counsel, the check "never made it past [the] front desk." How could NAS have believed
22 it was owed more than was tendered if it didn't bother to look at the check?

23 Therefore, Miles Bauer's tender on behalf of U.S. Bank's predecessor-in-interest either
24 extinguished or subrogated the superpriority piece of the HOA's lien such that the DOT, which

1 was in priority to the remaining subpriority piece on which the foreclosure proceeded, survived
2 the sale. *See SFR Investments Pool 1, LLC*, 2016 WL 4473427, at *6–8. The Court finds that
3 there is no genuine dispute that the sale in this case proceeded purely on the subpriority piece of
4 the HOA’s lien, and the foreclosure of a lien junior to the DOT cannot have extinguished it. U.S.
5 Bank is therefore entitled to summary judgment on its claim for a declaration that the HOA’s
6 sale did not extinguish the DOT.

7 **B. NV Eagles’s BFP Status**

8 NV Eagles argues it is a bona fide purchaser for value without notice (“BPF”), and that
9 the Court should therefore rule that it took title free of the DOT. A BFP is a person who pays
10 money for real property before obtaining notice of an earlier interest in the property. 5 Tiffany
11 Real Property § 1262 & n.39.50 (3rd ed. 2015). The traditional common law rule of competing
12 interests in real property is “first in time, first in right.” 11 Thomas, *supra*, § 92.03, at 97 (citing
13 Ralph W. Aigler, *The Operation of the Recording Acts*, 22 Mich. L. Rev. 405, 406 (1924) (“first
14 in time was first in right because there was nothing left for the second transferee”)). The equity
15 courts created exceptions to the traditional “first in time, first in right” rule. *Id.* § 92.03, at 98.
16 Under the common law, an earlier claim had priority over a later claim if both claims were legal
17 claims (as opposed to equitable claims). *Id.* § 92.03, at 97. The same was true if both claims were
18 equitable. *Id.* BFP status only mattered under the common law where the purported BFP had a
19 legal claim and a competing earlier claim to the property was purely equitable. *Id.*

20 Today, the difference between legal and equitable claims does not matter as much as the
21 policies behind recognizing BFP status (or not) in particular circumstances, and BFP-type
22 exceptions to the common law rule of priority are governed by recording statutes, in any case. *Id.*
23 § 92.03, at 98–99. Recording statutes are categorized as “race,” “notice,” or “race-notice”
24 statutes. *Id.* § 92.08, at 158. Under notice statutes, an exception to the traditional “first in time”

1 rule is codified for those who give value for an interest in land “without notice or knowledge” of
2 an earlier competing interest. *Id.* § 92.08(b). Race-notice statutes additionally require the later
3 grantee to record his interest before the earlier grantee. *Id.* § 92.08(c). Where notice matters, as
4 under notice and race-notice statutes, one who takes title without warranty can be found to have
5 had inquiry notice of prior unrecorded interests (and therefore not qualify as a BFP), because a
6 grantor’s refusal to issue standard warranties of title should put a reasonable and prudent person
7 on notice of potential competing interests. *Id.* § 92.09(c)(3)(C), at 191.

8 Nevada has a race-notice statute. *See* Nev. Rev. Stat. § 111.325 (“Every conveyance of
9 real property within this State hereafter made, which shall not be recorded as provided in this
10 chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable
11 consideration, of the same real property, or any portion thereof, where his or her own
12 conveyance shall be first duly recorded.”). In other words, a later-obtained interest can prevail
13 over an earlier-obtained interest in Nevada where the later purchaser has no knowledge of the
14 previous interest and records his interest first. It is not genuinely disputed that neither of these
15 elements is satisfied here. NV Eagles had constructive notice of the DOT at the time it acquired
16 its interest in the Property because the DOT had been recorded, *see* Nev. Rev. Stat. § 111.315,
17 and the foreclosure deed was of course not recorded before the DOT.

18 The remaining question is whether NV Eagles is a BFP as against the fact that the
19 superpriority piece of the HOA’s lien had been extinguished prior to the sale. That is, NV Eagles
20 argues that because it had no notice of the prior tender of the superpriority piece of the HOA’s
21 lien, the legal effects of that tender should not be imposed against NV Eagles. The general BFP
22 rule in Nevada is:

23 Any purchaser who purchases an estate or interest in any real property in good
24 faith and for valuable consideration and who does not have actual knowledge,
constructive notice of, or reasonable cause to know that there exists a defect in, or
adverse rights, title or interest to, the real property is a bona fide purchaser.

1 Nev. Rev. Stat. § 111.180(1). Even assuming the issue were whether NV Eagles had notice not
2 only of the DOT but also of the legal possibility that the DOT might survive the HOA
3 foreclosure sale (whether due to the pre-sale tender of the superpriority piece in particular or the
4 legal possibility that the sale might not extinguish the DOT under NRS 116.3116 in general), NV
5 Eagles was not an innocent purchaser. NV Eagles was on inquiry notice of the continuing vitality
6 of the DOT, especially considering that the sale price was a small fraction of the value of the
7 Property and it knew the winning bidder was to take a foreclosure deed without warranty. *See*
8 *Berge v. Fredericks*, 591 P.2d 246, 249–50 (Nev. 1979); 11 Thomas, *supra*, § 92.09, at 163
9 (“Persons who knew about or could have discovered the existence of prior adverse claims
10 through reasonable investigations should not be protected.”). A buyer who takes title without
11 warranty does not qualify as a BFP, because a grantor’s refusal to issue standard warranties of
12 title puts a reasonable and prudent person on inquiry notice of any competing interests. *See* 11
13 Thomas, *supra* § 92.09(c)(3)(C), at 191. And any inquiry to NAS and/or the HOA alone was
14 insufficient as a matter of law. *See id.* (noting that “reliance upon a vendor, or similar person
15 with reason to conceal a prior grantee’s interest, does not constitute ‘adequate inquiry’”). The
16 law was not clear at the time of the sale that the sale would extinguish the DOT at all,
17 superpriority tender or not, and a reasonable purchaser therefore would have perceived a serious
18 risk that it would not. NV Eagles cannot be said to be a BFP as against the DOT under these
19 circumstances.

20 **C. Commercial Unreasonableness**

21 The Court will not rule at this time under *Shadow Wood* (gross inadequacy of sale price
22 plus fraud, oppression, or unfairness) or *Levers v. Rio King Land & Inv. Co.*, 560 P.2d 917 (Nev.
23 1977) (commercial unreasonableness of the sale) because it has resolved the present motions on
24

1 other issues. If necessary to resolve, the Court would likely put the *Shadow Wood* and *Levers*
2 issues to a jury.

3 The Court need not reach the remaining issues in U.S. Bank's motions. Therefore, the
4 Court will deny U.S. Bank's motion to file excess pages as moot, (ECF No. 132), because the
5 Court will not address the constitutional arguments raised within the excess pages.

6 The Court finds that a declaration that the DOT remains valid against the Property is
7 sufficient to make U.S. Bank whole. Accordingly, unless U.S. Bank wishes to further pursue any
8 remaining claim for the purpose of obtaining damages, there appears to be nothing left to
9 determine in this case.

10 CONCLUSION

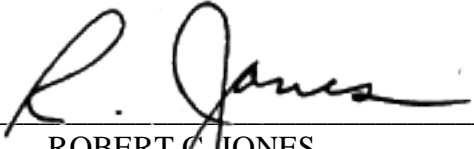
11 IT IS HEREBY ORDERED that U.S. Bank's motions for summary judgment (ECF No.
12 130, 131, 147) are GRANTED. Within fourteen (14) days, U.S. Bank shall submit either a
13 proposed form of judgment or a notice of its intent to prosecute any remaining claim.

14 IT IS FURTHER ORDERED that NV Eagles's motion for summary judgment (ECF No.
15 134) is DENIED.

16 IT IS FURTHER ORDERED that the motion to file excess pages (ECF No. 132) is
17 DENIED as moot.

18 IT IS SO ORDERED.

19 DATED: This 23rd day of May, 2017.

20
21 
22 ROBERT C. JONES
23 United States District Judge
24